What protection for the unborn child of a psychologically vulnerable adult?

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We describe a case that illustrates the difficulties of protecting the unborn children of 'vulnerable adults'. These people are psychosocially vulnerable, but are not afforded the protection of the Mental Health Act 1983 because they do not have 'treatable mental illness'.

CASE HISTORY

A woman of 31, thirty-five weeks pregnant, arrived at hospital distraught. She revealed that she had been in contact with the psychiatry services and was detained under Section 2 of the Mental Health Act. She was well known to our service, with a diagnosis of dependent personality disorder (ICD-10 F60.7) and traits of anxious personality disorders (ICD-10 F60.6)[1]. Her presentations had been characterized by failure to cope at times of stress and hospital admissions with self-neglect and anxiety. At no time had she met the diagnostic criteria for affective or psychotic illness, nor was there evidence of learning disability. Her lifestyle was chaotic: she sometimes slept rough and was an alcohol abuser.

The first of her two existing children was in the custody of her father, and the second had been taken into care at birth. When it became apparent that she was pregnant for a third time (by a casual partner) arrangements were made to take this child likewise into care at birth. Desperate to keep the baby and wishing to avoid contact with social services, the patient did not attend for psychiatric follow-up or for local antenatal care. She did, however, present at various other institutions in the region, often under pseudonyms, seeking antenatal care.

On admission her psychiatric state was similar to that on previous occasions and much of the concern leading to her detention was for the unborn child's safety. She was unwilling to accept the legal authority of the proceedings in place to protect her child and she had no intention of staying in hospital informally as she felt herself to be capable of caring for the child herself. The Section was due to expire around the expected date of delivery and she had appealed against it. The psychiatric team were concerned that, were she to be discharged, her unborn child would be at great risk.

Advice and support was sought from several professionals. The *consultant obstetrician*, whilst satisfied with her medical progress, wished for her to be detained until delivery. There was not thought to be medical justification for early induction or caesarean section. The *child and family social services* had put in place all the necessary measures to implement child protection proceedings at the birth and were also anxious that she should remain in detention. Both the *Mental health trust solicitors* and the *Mental Health Act Commission* felt that there was no legal power to detain the patient, but advised us to keep her detained under the Mental Health Act until the tribunal. The basis of their decision was as follows. The Mental Health Act 1983 allows the detention of patients with mental illness, mental impairment, severe mental impairment or psychopathic disorder of a nature or degree which warrants compulsory treatment. Section 2 allows patients to be detained for a period of assessment not exceeding 28 days. A patient may be compulsorily admitted in the interest of his or her own health or safety, or for the protection of other people, though only one of these needs to be satisfied[2]. Regarding 'the protection of other persons', 'other persons' does not include an unborn child irrespective of gestation and viability. Thus, since the patient did not have a mental health disorder that justified her compulsory admission, and since her unborn child had no legal rights, it was thought that her continuing detention might not be indicated.

A mental health review tribunal (consisting of a legal member as chair, an independent psychiatric second opinion and a lay member) was held 19 days after the Section came into force. After a long discussion it was decided to discharge the patient from the Section. There were judged to be no grounds to detain her, and the treating psychiatric team was criticized for having lacked the courage to discharge her, and for leaving this responsibility to the tribunal. However, the tribunal expressed in its report 'considerable concerns . . . she has a poor record in relation to co-operation with statutory authorities . . . she is clearly a vulnerable individual'. Unusually, discharge was deferred until noon the next day to ensure that adequate community support could be put in place. The tribunal concluded that

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'the Mental Health Act 1983 cannot be used as a device to detain persons not suffering from a mental disorder whose circumstances may give rise to social concerns'. The patient was given outpatient appointments with her psychiatrist and her obstetrician. She did not attend either and was reported by neighbours to have moved out of her home.

COMMENT

If a pregnant woman displays personality traits and chaotic behaviour that place her unborn child at risk but has no 'treatable mental illness', there is no apparent legal framework to ensure the child's safety. It is of note that the Mental Health Act 1983 does include as part of psychopathic disorder 'seriously irresponsible conduct on the part of the person concerned', and we did consider whether our patient might be detainable for this reason. However, we concluded that, had she not been pregnant, we would not have judged her behaviour remarkable. An unborn child has no 'legal personality' and cannot for its own protection be regarded as a different person from its mother[3].

Two previous legal cases are helpful in clarifying the issues. One mother refused a caesarean section for pre-eclampsia against medical advice. She was detained under Section 2 of the Mental Health Act and the caesarean section was performed, but a later judicial review found her detention to have been unlawful. It was deemed that the Mental Health Act could not be used to detain the patient 'merely because her thinking process is unusual'[4]. Another case concerned an application for the unborn second child of a mentally disturbed, erratically behaved, mother to be made a ward of court. It was felt that this would allow the mother to be located and 'ensure her residence in a suitable place and to exercise care and control when the baby was born'. This was judged to be impossible by the Family Division because the rights of the mother could not be infringed for the benefit of an unborn child who has no right to action in English civil law[5]. As soon as a child is born, it is entitled to protection under the Children Act 1989.

The present case highlights a deficiency in legislation related to the protection of the unborn. Comparisons may be drawn here with other areas, for example fertility treatment, where doctors must by law consider the welfare and best interest of any child who may be born of successful treatment. That said, the law is generally reluctant to attribute any legal status to the unborn child, not least because of the implication for existing abortion laws. It is ironic that a child born at 24 weeks' gestation has more rights to protection in law than an unborn baby at term.

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REFERENCES

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2 Jones R. *Mental Health Act Manual*. London: Sweet & Maxwell, 1999

3 Whitfield A. Common Law duties to unborn children. *Med Law Rev* 1993;[January]:28–52

4 St Georges Healthcare NHS Trust v S;R v Collins and other ex parte S [1998] FLR 728

5 Re F (In Utero) (Wardship) [1988] FLR 307